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## On Public Reason

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# ON PUBLIC REASON

KENT GREENAWALT\*

## INTRODUCTION

Since the publication of *A Theory of Justice*<sup>1</sup> in 1971, John Rawls has refined, qualified, and enriched his political philosophy, responding generously and with patient analytical care to difficulties posed by critics. *Political Liberalism*<sup>2</sup> embodies the major developments in Rawls's thought during those two decades. Rawls continues to be a strong defender of political liberalism, but in various respects his philosophical claims are more modest than those he offered in 1971, and the political life he recommends involves more accommodation to the diverse perspectives and ways of life one expects to find in liberal democracies. In most of the chapters of the book, Rawls largely replicates what he has said in important lectures, but each chapter contains some fresh analysis and references to recent work. The most substantial addition to his previous writings is his chapter on "The Idea of Public Reason,"<sup>3</sup> and that is the focus of this Essay. My discussion of that topic requires some attention to another major subject, the "overlapping consensus" of views that can support a political concept of justice, but I do not say more about that subject than is needed for my discussion of public reason.

I first sketch briefly the basic problems to which Rawls's idea of public reason is an answer. I then summarize Rawls's position, drawing mainly from the chapter on public reason, but also outlining his views about overlapping consensus. After clarifying some important aspects of his position, I make some criticisms. These are largely directed at a distinction between constitutional essentials and matters of basic justice, on the one hand, and ordinary political issues, on the other, that forms a major element of Rawls's proposal about public reason. Finally, I suggest very briefly some ways to strengthen an account of the constraint of public reasons.

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1. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).
2. JOHN RAWLS, *POLITICAL LIBERALISM* (1993).
3. *Id.* at 212-54.

## I. THE BASIC PROBLEMS

Within a liberal democracy, people will inevitably have widely differing understandings about the nature of the universe, the existence (or not) of God, and the point(s) of human life and of society. These differences are the fruit of human freedom. If these differences bore only on matters everyone agreed should be private, they would pose no threat to politics. Whether I believe in the "big bang" theory of the origin of the universe or choose to meditate in my spare time is not important for the public at large. But many of the differences have evident implications for collective social life. If, for example, I am a Roman Catholic *and* my Roman Catholicism leads me to believe that society should give "priority to the poor" and should regard a newly formed embryo as having the moral status of a full human being, these views have a clear potential import for political decisions about welfare and abortion. That creates a dilemma.

If widely variant perspectives on critical subjects dominate political life, society may suffer disunity. Citizens may not be able to depend on the application of any core principles of justice and they may find none to which they need feel loyalty. Some citizens may well find themselves coerced by the state to act on the basis of reasons with which they feel no resonance. That may be unfair and a source of great antagonism. On the other hand, if citizens are told that in politics they should not use their most fundamental beliefs about what is true, that may seem both unreasonable and a serious infringement of full liberty. This conflict is the dilemma, and it is a genuine one. Various theorists respond to it in various ways; every proposal sacrifices something of value.<sup>4</sup>

## II. RAWLS'S POSITION

Rawls suggests that a well-ordered society will have wide agreement on principles of political justice. The agreement will be supported by an overlapping consensus of "comprehensive views." It will include a principle of public reason for public political advocacy about constitutional essentials and matters of basic justice. I need to say a little about the first two elements before focusing on the third.

According to Rawls, the fundamentals of political life should be more or less agreed upon, and set outside ordinary political wrangling. One way in which this could occur would be if everyone subscribed to

4. I try to show this in GREENAWALT, *supra* note \*.

the same religious or other comprehensive view, *and* had a similar opinion of that view's implications for politics. This route, however, is effectively blocked in liberal democracies by the inevitable plurality of comprehensive views. Nonetheless, since people with different comprehensive views might share similar ideas about political justice, a consensus on the basic political structure of society remains a possibility. It is this possibility that Rawls's theory exemplifies.

Many people read Rawls's *A Theory of Justice* as claiming a methodology for arriving at *the most rational* principles of justice.<sup>5</sup> In subsequent writings, Rawls has made clear that his more modest aspiration is to set out principles for liberal democracies, ones that best capture the fundamental idea of "a fair system of cooperation between free and equal persons."<sup>6</sup> Why should a citizen accept such principles if his comprehensive view suggests a different basis of social life *or* an unusual understanding of how the fundamental idea of fair social cooperation applies? (Imagine that a fervent religious believer thinks that theocracy may be preferable to liberal democracy or accepts Rawls's fundamental idea of fair social cooperation, but thinks that treating people as free and equal means giving all people the strongest encouragements to adopt the true faith.) Why should such a person accept principles of justice which an incomplete common reason suggests?

Rawls's response is that appropriate principles of justice are ones that are sustained, or at least could be sustained, by an overlapping consensus of comprehensive views.<sup>7</sup> These principles, initially developed as a "free-standing political . . . conception"<sup>8</sup> for the basic structure of society, fit with a wide range of comprehensive views likely to arise in a liberal democracy. A comprehensive view is "reasonable" if it acknowledges the freedom and equality of citizens on which political liberalism rests. A democratic regime can be enduring or stable only if a substantial majority of its citizens freely support it. If people understand this, they may accept principles of justice other than those their comprehensive views might initially have inclined them to favor. They may realize that efforts to create a theocracy or to provide

5. RAWLS, *supra* note 1. Rawls did not assert that he had arrived at *the best principles*, but he seemed to be aiming for such principles, with those he presented as the best he could do.

6. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 231 (1985).

7. See RAWLS, *supra* note 2, at 133-72.

8. *Id.* at 140-41.

strong inducements toward one set of religious beliefs would be unfair and highly disruptive.

Rawls asserts that many people in a society will accept principles of justice because these fit with their *reflective* full or partial comprehensive views;<sup>9</sup> others will believe the principles are appropriate without direct reference to nonpolitical aspects of their particular comprehensive views.<sup>10</sup> Principles of justice can be argued for as valid, or desirable, or appropriate without reliance on any particular comprehensive view, though the validity of these principles will depend largely on their capacity to fit with an overlapping consensus of comprehensive views. It is in this sense that Rawls argues that political philosophy need not be metaphysical. In a well-ordered society, a plurality of reasonable comprehensive views will support the basic political structures and ideas of justice.

One aspect of the principles of justice in a liberal democracy will be a principle of common reason. Rawls says "[t]here is no reason . . . why any citizen, or association of citizens, should have the right to use the state's police power to decide constitutional essentials or basic questions of justice as that person's, or that association's, comprehensive doctrine directs."<sup>11</sup> When citizens talk with all their fellows about such matters, they are to look to what is commonly shared, not to what divides them.

What precisely does Rawls imagine as the reach of the overlapping consensus of reasonable comprehensive views? In some earlier writing, it appeared that the consensus might embrace highly specific principles of justice, including such features as fair equality of opportunity and the "difference" principle, as developed by Rawls. In *Political Liberalism*, Rawls explicitly recognizes the possibility of a much weaker shared understanding, such as acceptance of basic constitutional procedures.<sup>12</sup> He envisions the full overlapping consensus as reaching more deeply and broadly than that. Apparently, however, it will leave room for some disagreements about important issues of justice. In the chapter on public reason, Rawls assumes that other liberal views about social justice will compete with his ideas of fair opportu-

9. A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and virtues and is rather loosely articulated.

RAWLS, *supra* note 2, at 175.

10. *Id.* at 155.

11. *Id.* at 62; *see also id.* at 226.

12. *Id.* at 158.

nity and the difference principle; and I assume that the overlapping consensus is to be capacious enough to embrace a variety of perspectives on these subjects.

I have said that my main interest in Rawls's thesis about an overlapping consensus lies in how it relates to his theory of public reason. About that relation, we can conclude preliminarily that citizens properly consult their comprehensive views to determine whether they accept political structures and principles of justice; however, in public discussions of applications of shared principles to particular circumstances, comprehensive views are to recede in favor of public reasons.

I turn now to that subject, to Rawls's account of public reason and fundamentals. Rawls talks of public reason as the reason of citizens sharing equal citizenship.<sup>13</sup> Justifications in terms of public reasons "appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."<sup>14</sup> One employing public reasons does not appeal to comprehensive religious and philosophical doctrines, but rather "a reasonable balance of public political values."<sup>15</sup>

According to Rawls, the work of the Supreme Court exemplifies the use of public reason, and that is the "sole reason" it exercises;<sup>16</sup> for others, the requirement to use public reason is less constraining. It holds for those engaging in political advocacy in the public forum, and for candidates and elections; it does not apply to personal deliberations and reflections, or to reasoning within associations such as universities or churches, where religious, philosophical, and moral considerations of many kinds properly play a role.<sup>17</sup>

For citizens and legislators, "the limits imposed by public reason do not apply to all political questions but only to those involving what we may call 'constitutional essentials' and questions of basic justice."<sup>18</sup> Regulation of property, preserving animals, and controlling pollution are not included in this category. A liberal principle of legitimacy and a duty of civility require that on fundamental questions, principles and policies can be supported by public reason. Rawls expects that values specified by a fundamental political conception will give a reasonable

13. *Id.* at 213.

14. *Id.* at 224.

15. *Id.* at 243.

16. *Id.* at 235.

17. *Id.* at 215.

18. *Id.* at 214.

public answer to all, or nearly all, questions about constitutional essentials.

Rawls indicates what he means by constitutional essentials in the following passage:

There is the greatest urgency for citizens to reach practical agreement in judgment about the constitutional essentials. These are of two kinds:

- a. fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
- b. equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.<sup>19</sup>

As far as questions of basic justice are concerned, Rawls asserts that some principle of opportunity and a social minimum providing for the basic needs of all citizens are essentials, but more stringent aspects of his own theory of justice (namely, fair equality of opportunity and the difference principle) go beyond the essentials.<sup>20</sup> Rawls explains that settling the constitutional essentials dealing with basic freedoms is urgent, that telling whether these essentials are realized is far easier than telling if principles governing social and economic inequalities are realized, and that gaining agreement about what the basic rights and liberties should be is also comparatively easy; "[t]hese considerations explain why freedom of movement and free choice of occupation and a social minimum covering citizens' basic needs count as constitutional essentials while the principle of fair opportunity and the difference principle do not."<sup>21</sup>

### III. CLARIFICATIONS

The principle of self-restraint implicit in Rawls's ideal of democratic citizenship would restrict use of reasons, such as narrow claims of faith, that are not publicly accessible; but Rawls makes clear that direct reference to comprehensive views is out, even when people believe they can be arrived at by common reasoning. Rawls thus avoids the criticism that it is unfair for the holder's own belief about whether

19. *Id.* at 227.

20. *Id.* at 228-29.

21. *Id.* at 230.

common reason can establish his comprehensive view to become the standard for whether he may rely on the view.

In respect to the *precise coverage* of the requirement to limit oneself to public reasons, four points need clarification. The first concerns the range of persons and contexts for which the requirement reaches all topics. The second is the status of basic questions of justice that are not covered within constitutional essentials. The third is the importance of public reasons for situations other than those when the requirement to employ such reasons strictly applies. The fourth is the degree of constraint that compliance with a standard of public reasons involves, when the standard strictly applies.

Rawls assumes that courts should limit themselves to public reasons in all circumstances.<sup>22</sup> Such reasons should be the exclusive mode of justification, and of internal deliberation as well. Rawls contrasts courts with legislators and citizens, who may bring other reasons to bear on nonfundamental issues, like the treatment of animals. In this connection, Rawls does not discuss actual statutory language, or the content of reports of committees of Congress and of administrative agencies, or the language in which the executive branch formally proposes the enactment of legislation. Would he think that the justifications in such official pronouncements should be restricted to public reasons for all subject matters? The range of what such documents appropriately say is somewhat broader than the typical judicial opinion, because preambles to statutes, committee reports, etc. need not draw justifications from pre-existing law, as do most judicial opinions.<sup>23</sup> In a society with many reasonable comprehensive views, it is highly doubtful whether any particular comprehensive view should be presented as a major justification for new legislation, but perhaps a committee report might point out that a provision to protect animals fits with many comprehensive views that are widely held in society. Such a justification might be found in a judicial opinion, but it would be unusual.<sup>24</sup> If what Rawls says about courts and public reason is sound, certain other kinds of official documents are appropriately cast

22. Rawls is thinking about decisions of legal issues. I am not sure whether he thinks Supreme Court justices, or judges more generally, are limited to public reasons in *all* the functions they perform. Rawls concentrates on the Supreme Court, but he also speaks more generally of "the judiciary." See *id.* at 216.

23. Some judicial opinions do draw implicitly or explicitly from community morality or forms of normative evaluation that reach beyond interpretations of preexisting standards. I discuss these matters in Chapter 13 of GREENAWALT, *supra* note \*, and at greater length in KENT GREENAWALT, *LAW AND OBJECTIVITY* 163-231 (1992).

24. Yet, in *Roe v. Wade*, 410 U.S. 113 (1973), for example, the Court's opinion surveys historical attitudes toward abortion.



in some (perhaps broader) form of public reason, even when they do not deal with constitutional essentials or questions of basic justice.<sup>25</sup>

The second question about covered topics concerns the relationship between "constitutional essentials" and "questions of basic justice." Rawls says that the requirement of public reason applies to both of these.<sup>26</sup> Midway in his discussion he concludes that some principle of opportunity and a social minimum providing for basic needs—certainly matters of basic justice—are among the constitutional essentials.<sup>27</sup> Fair equality of opportunity and the difference principle—crucial aspects of his own political conception of justice—fall outside the constitutional essentials. Do the constraints of public reason apply only to the constitutional essentials, which include *minimum* requirements of basic justice, or do the constraints *also apply* to advocacy about matters of basic justice, such as fair equality of opportunity and the difference principle, that go beyond the constitutional essentials? This is an important practical question because many political issues will turn on controversial conceptions of justice that reach beyond the minimum. Particularly since these issues will be sharply contested, it matters whether people can appropriately employ their comprehensive views in public justifications for their positions. Rawls plainly intends the constraint of public reasons to apply to advocacy about these issues of basic justice that reach beyond the constitutional essentials.<sup>28</sup>

The third question concerns the status of public reasons for topics when other reasons may be used. At an early point, Rawls talks as if he is beginning with the clearest illustrations of a concept of public reason and is uncertain to what extent the relevant restrictions apply to a broader range of political issues.<sup>29</sup> He also says that it is usually highly desirable to settle political questions by invoking the values of public reason. Later, however, he indicates that "[c]itizens and legislators may properly vote their more comprehensive views when con-

25. Rawls does say that the ideal of public reason "applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements," Rawls, *supra* note 2, at 216, but this comment does not focus on the possible coverage of a requirement beyond constitutional essentials and matters of basic justice.

26. *Id.* at 214.

27. *Id.* at 228-29.

28. Rawls says, "[p]olitical discussions of the reasons for and against fair opportunity and the difference principle, though they are not constitutional essentials, fall under questions of basic justice and so are to be decided by the political values of public reason." *Id.* at 229 n.10. Although the reader senses that the effort to decide what falls within the constitutional essentials is important for the constraints of public reason, it turns out that that effort does not really matter when a subject falls within questions of basic justice.

29. *Id.* at 215.

stitutional essentials and basic justice are not at stake . . . .”<sup>30</sup> I take his comments in the following way: that the general preclusion of justifications in terms of comprehensive and other nonaccessible reasons applies for legislators and citizens only to constitutional essentials and basic questions of justice, but that, more generally, commonly accessible reasons should have a kind of priority in liberal democratic politics.

I turn now to the fourth question: what does the constraint of public reasons amount to for the topics to which it strictly applies? Here we need to consider the behavior that the constraint covers, and more particularly, the relation between grounds offered in justification and the actual grounds of decision. Some passages suggest that Rawls is concerned with public justification rather than decision. He says the limits of public reason do not apply to personal deliberations and reflections about political questions, or to reasoning within associations; the limits apply only to public political advocacy.<sup>31</sup> That sounds a little like people can make up their minds on various grounds, so long as they publicly discuss the issues in terms of public reasons. However, other passages make clear that this is not Rawls’s full view. At numbers of places he talks about voting as covered; the ideal of public reason calls on one not to vote one’s simple preferences and interests or even what one thinks is right and true by comprehensive convictions.<sup>32</sup> Many legislators never have to explain particular votes, and many citizens do not even reveal their votes. The constraint on voting clearly indicates that the principle extends beyond publicly stated advocacy and justification.<sup>33</sup> Rawls’s reference to courts as exemplars of his concept of public reason strongly suggests the same conclusion. Courts, in general at least, are supposed to be guided by the reasons they state. Rawls does not imagine that judges on an appellate court have fulfilled their duty if they have self-consciously determined their decision by a comprehensive view they happen to hold in common and then have offered entirely different public reasons in a majority opinion. For judges, public reasons should guide decision as well as debate and opinion writing; Rawls holds up judicial practice as a sort of model.

30. *Id.* at 235.

31. *Id.* at 215.

32. *Id.* at 215-20.

33. I take “public advocacy” as involving an expression, that others may read or hear, of the basis of one’s view. One may, instead, conceive of voting as a form of advocacy, although secret voting does not reveal even one’s overall conclusion and open voting (taken alone) does not indicate the basis for one’s conclusion.

Rawls's discussion leaves a bit of uncertainty on one subject that is critical to the relation between actual grounds of decision and public justification—whether the proponent of a position must himself believe in the public justification he offers. Rawls writes that the ideal of citizenship imposes a “duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate . . . can be supported by the political values of public reason.”<sup>34</sup> He says that “[w]hat public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of public political values . . . .”<sup>35</sup> Imagine the following situation: Joan believes that for possible criminalization of some late abortions, various positions can be supported as consonant with a reasonable balance of public reasons. Her comprehensive view leads her to believe that maximum criminalization is desirable. She thinks a reasonable defense of that position can be made in terms of public reasons, but her own sense of the *balance of public reasons*, taken alone, is that they support a different position. Is it appropriate for her to vote for the position that fits her comprehensive view and support the vote with an argument of public reasons in which she does not fully believe? In Rawls's language, Joan could “explain” her vote for maximum criminalization “in terms of a reasonable balance of public political values,” but her explanation would not be persuasive to her. I believe that Rawls has in mind a sincere justification, one which the speaker actually credits.<sup>36</sup> If this is accurate, Joan is not fulfilling her responsibility to rely on public reasons if her basis for believing in maximum criminalization is the statement of a religious authority, and she offers arguments of public reason that she thinks are reasonable but finally unpersuasive. Suppose, however, religious authority leads Joan to conclude that certain arguments of public reason really are persuasive, although she does not grasp from their own terms why that is so (as a Roman Catholic might believe natural law arguments against abortion are valid, while realizing she would not reach this conclusion in the absence of the Church's position to this effect). Joan now does believe in the force of the public reasons she states. This is enough to satisfy Rawls.

34. RAWLS, *supra* note 2, at 217.

35. *Id.* at 243; *see also id.* at 226-27, 246.

36. This belief is based partly on correspondence with Rawls. *See also* RAWLS, *supra* note 2, at 241, which makes clear that a person must sincerely think his view is based on political values others can reasonably be expected to endorse. This passage does not quite cover the situation of conflicting values, but it supports the conclusion I have reached.

In light of the apparent need for a *sincere* justification in terms of a balance of public reasons, Rawls's comments that the limits of public reason do not apply to private reflection and associational discussion are somewhat less permissive and important than they appear at first glance. The primary way that citizens *act* to resolve political issues is by public advocacy and voting, and by urging legislators to vote. If decisions by citizens and legislators how to vote are to be determined by public reasons, just what is the significance of discerning in reflection, or in discussion with co-believers, the implications of one's comprehensive views for particular political issues? Rawls, focussing on the abolitionists and Martin Luther King, does discuss the question of whether people properly offer reasons related to their comprehensive views *as well as* public reasons. He comes down in favor of the inclusive view that such reasons may be offered, concluding that it "best encourages citizens to honor the ideal of public reason and secures its social conditions in the longer run in a well-ordered society."<sup>37</sup> Nevertheless, the way one reflects by oneself and discusses with co-believers will be deeply affected by a standard of public reasons for appropriate decision-making. For example, if we assumed that Supreme Court justices are supposed to decide by public reasons, we might be disconcerted to learn that three Roman Catholic Supreme Court justices were discussing with each other exactly what the implications are of Roman Catholicism for a particular constitutional issue. Thus, Rawls's limiting of the requirement of public reasons to voting and public advocacy is less significant than one might initially suppose; that requirement would infect thought and discussion of relevant issues in all settings.

#### IV. CRITICISMS

With these clarifications, we are ready to consider more fundamental questions about Rawls's approach. I discuss three related problems: (1) the need for, and possibility of, agreement on constitutional essentials; (2) the nature and problem of interpretation of essential principles; and (3) difficulties with crucial lines of distinction.

37. *Id.* at 248. However, when a society is well-ordered, with a firm overlapping consensus and an absence of deep disputes, citizens will honor the ideal of public reason by appealing to the values of the shared political conception.

### A. *Agreement on Essentials*

Is it necessary for people in a liberal democratic society to agree on constitutional essentials? Is it desirable for them to do so? In approaching these questions, we may usefully keep in mind the present day United States. No doubt, some liberal democratic societies are so homogeneous that very wide agreement on constitutional essentials can coexist with some differences in comprehensive views—perhaps Sweden is a modern example—but Rawls mainly imagines societies much more diverse than Sweden. With its continuing substantial immigration from all parts of the world, the United States includes people of tremendously varied backgrounds and outlooks on life; it is more typical of the problem Rawls puts to himself.

In theory at least, a diverse society might manage if people agreed generally that political change should be peaceful and accomplished according to existing constitutional devices, even if they considered all substantive matters, including basic constitutional requisites, as up for argument. Professor Joseph Raz suggests that agreement on constitutional essentials is not so important to stability: "Rather, affective and symbolic elements may well be the crucial cement of society, and to these one has only to add the little power individuals have to affect societal affairs."<sup>38</sup> But, even if a society can be moderately stable with widespread disagreement about the wisdom of basic constitutional arrangements, Rawls is correct that *if* agreement can be achieved on basic essentials, *if* some fundamental matters are taken off the agenda, that will *contribute to stability and coherence*. Whether such agreement is *feasible* depends partly on the expansiveness of the subjects to be covered and the place of an idea of common reason.

I shall concentrate on freedom of religion and separation of church and state, but the issues I discuss are representative of those involved with most "constitutional essentials." I want initially to consider a minimal version of agreement on these two related essentials about religion and then to address a much fuller version of possible agreement. The minimal version includes agreement about what would generally be regarded as the most direct violations of religious liberty and separation of church and state: agreement, for example, that the state should not forbid people from adhering to particular

38. Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 1, 30 (1990).

religious beliefs or to practices of worship,<sup>39</sup> that no particular religion, such as Presbyterianism, will be denominated the state religion, that church officials will not by dint of their positions automatically hold important government offices, and that government officials will not automatically hold church positions. If that is what we mean by agreement on religious liberty and church-state separation, agreement in the United States is very great. Since existing agreement on these subjects is so great, it really does not matter too much whether public discussion and potential voting directly *about them* includes or excludes substantial reliance on comprehensive views.

A fuller version of religious liberty and church-state separation might include matters such as “no government promotion of religious truth,” “no substantial direct aid of religious schools,” and “no prayer in public schools,” *and* the idea that elaboration and development of ideas of religious liberty and church-state separation will be carried forward in terms of common reason. Agreement about these matters is obviously a lot harder to attain, and certainly is not close to existing now in the United States. Many people think, for example, that the government should promote Christianity in certain ways, that the state should give substantial aid to parochial schools, that prayer should be allowed in public schools, and that decision of these issues themselves should be based substantially on reference to comprehensive views.

We might conceive of agreement as being much more abstract. People would agree that citizens should enjoy religious liberty and that church and state should be separate, but without reference to details. Agreement on such abstract ideas may exist now in the United States, but this agreement has limited significance when many people have very definite ideas on how to fill in details, and these ideas conflict powerfully with each other.

We can, thus, imagine agreement on “constitutional essentials” in liberal democracies but such agreement is likely to be limited to general abstractions and to what constitutes blatant violations. There is bound to be important *disagreement* about a range of debated applications. Public judgments and discussion about that range of possible applications will greatly affect the political life of the society; and constraints set by public reason will matter.

39. State prohibitions may reach religious practices, like snake handling, that are deemed to cause some secular harm.

### B. *Interpreting Essentials*

The problem of *interpreting* essentials can be illuminated by considering the position of someone who favors public school classroom prayer and extensive financial aid to parochial schools. Such a view might be seen as (1) *rejecting* all plausible understandings of religious liberty and church-state separation, (2) offering a genuine interpretation of these essentials but one that is out of accord with what a balance of public reasons would indicate, or (3) offering an interpretation from the perspective of a comprehensive view on questions for which public reason is indecisive.<sup>40</sup>

I shall explore briefly the possibility of rejection. Advocates of prayer and aid do not regard themselves as rejecting all plausible understandings of religious liberty and church-state separation; they point out that their views have enjoyed wide currency and even been dominant in long periods of the country's history. Suppose, however, that we persuade those who urge prayer and aid that their position is a move *away from* any plausible account of religious liberty or church-state separation,<sup>41</sup> or both. So long as they continue to believe that their approach is desirable and enjoys powerful historical support, why should they not feel they remain free to advocate it? Here we face the question why a citizen need feel loyalty to institutions and practices that are at odds with those his comprehensive view seems to recommend. The citizen facing this dilemma will need to examine how much room his comprehensive view leaves for loyalty to existing institutions when other possible social arrangements seem to fit better with his comprehensive view. To put the point a bit differently, the person will have to ask if his *reflective* comprehensive view calls for disloyalty to existing institutions in these circumstances. He may finally decide that these institutions actually do fit his comprehensive views best; or that the institutions should be accepted as a compromise necessary in the circumstances, although they are less than ideal; or that he should conform with the rules of the institutions while working to change them; or that he should feel free to decline compliance altogether, insofar as that is possible.

40. Of course, yet another logical possibility is that this view is the one a balance of public reasons would yield. I do not consider this position because it would eliminate (for this example) the problem I am addressing.

41. It is much more likely that a proponent of less strict separation would concede that his position deviated from a model of church-state separation than a model of religious liberty. That is, he would be more likely to concede some compromises with separation than some compromises with liberty.

Let us suppose, instead, not only that the advocate of prayer and aid offers an account of what he thinks religious liberty and church-state separation should amount to in our society, but that we agree that the account he provides is a plausible one. To give this alternative maximum persuasiveness, we might imagine that the person supports aid to parochial education primarily because of its substantial secular value, and that he supports school prayer as an accommodation to the exercise of religion of those who want to pray that interferes only minimally with those who prefer not to pray in school. We *might* conclude that public reason does not tell us how the concepts of religious liberty and separation should be interpreted in these doubtful areas, and that people must inevitably rely on comprehensive views to resolve those questions. That understanding, which I think may well prove accurate for some controversial problems about the state and religion, would increase the difficulty of defending any position that citizens should self-consciously try to limit their political justifications to public reasons.

I want to consider the possibility that more strongly favors Rawls's recommendation that citizens rely on public reasons in decision and discourse. That possibility, which I believe holds for some problems, is that public reasons, taken alone, do suggest one outcome, but that people who rely on comprehensive views to color their understanding of constitutional essentials and publicly shared principles may reasonably arrive at a different outcome. Since Rawls himself talks about failures to realize constitutional essentials as relatively easy to identify, perhaps he doubts that such situations will arise;<sup>42</sup> but I believe they may, so long as constitutional essentials are understood to cover more than the most gross violations of concepts like religious liberty and church-state separation.

I shall illustrate this point by reference to abortion, an issue Rawls explicitly considers. He says:

Suppose . . . that we consider the question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. (There are, of course, other important political values besides these.) Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equal-

42. See RAWLS, *supra* note 2, at 229-30.



ity of women is overriding, and this right is required to give it substance and force.<sup>43</sup>

Rawls suggests that public reason would, on balance, support a broadly permissive approach to abortion for at least the first trimester. I am not certain what Rawls is assuming about the status of the embryo/fetus; but suppose Joan takes the following position:

Political values cannot tell us how much a fetus should be valued; they are either radically incomplete *on this question* or suggest that a fetus is probably of much less value than a new born baby. On either understanding, women should have substantial freedom to have early abortions. But I *know* from my comprehensive view that a fetus deserves as much moral consideration as a new born baby. On that understanding, either a woman should not have a legal right to abortion, or the appropriateness of such a right is highly debatable, and a broad right to abortion should not be considered required by constitutional essentials.

This illustration shows how comprehensive views can influence someone's sense of the application of fundamental values. In Joan's view the fundamental value of protecting "innocent human beings" against "willful killing" colors how equality for women should be regarded (or constitutes a value that here competes with full equality). Thus, someone's comprehensive view can lead her to a different understanding of the full content of a constitutional essential than she would reach if sticking to public political values alone.

A person might see some church-state issue similarly. He might, for example, suppose that if one stuck with public reasons of equality of citizenship and church-state separation, one would think they were best promoted by not having substantial aid to religious schools, despite the valuable general education those schools provide. However, thinking that religious salvation is of overarching importance for human life and that religious schools help promote that, he might decide that substantial public aid is, on balance, desirable, and represents a better understanding of religious liberty and church-state separation.

In more typical cases people will not try to figure out what political values alone would indicate; their judgments will be infused by their transcendent perspectives. Since Rawls's restrictions reach *how one votes* and *whether* one publicly advocates a particular outcome, rather than just *how* one advocates an outcome one decides to support on other grounds, his constraint to public reasons is significant, requir-

43. *Id.* at 243 n.32.

ing people who wish to comply with an ideal of citizenship to support positions they think are indicated by a balance of public reasons.<sup>44</sup>

Rawls does not deny that people may sometimes face conflicts between their own comprehensive views and public reasons, and that they must resolve these conflicts in light of their own comprehensive views. Thus, he might treat my examples as simply (somewhat complicated) conflicts of this sort. But I think their force goes beyond this; it calls into question the desirability of a standard of public reason that asks citizens to aim for justifications on particular issues that do not rely on comprehensive views.

### C. *Difficult Lines of Distinction*

Serious technical problems arise out of difficult lines of distinction drawn by Rawls. Examination of these lines raises further doubt about the theoretical defensibility of his position and about the feasibility of its practical application.

One distinction in Rawls's schema is between what are constitutional essentials, on the one hand, and what are interpretations and applications on the other. Church-state examples can be troubling in this respect. A principle of "no government aid to religious organizations" might be considered an essential or an interpretation of the essentials of religious liberty and church-state separation. For ordinary purposes, this particular distinction is elusive, depending on the level of generality at which some basic right or fundamental principle is cast. But this distinction is important for Rawls in two ways. First, the essentials are deemed to be off the political agenda; people can argue about interpretations but they, mostly, accept the essentials. Second, if the subject does come up why existing essentials should remain as such, one is free to explain that one's own comprehensive view (part of the overlapping consensus) supports a political conception that includes such essentials. Yet, if the issue is interpretation, one must rely on public reasons (using one's comprehensive view only to provide supplementary reasons for a position). Thus, imagine someone whose religious view strongly indicates that government should give some support to religion. He may say, "I cannot accept this essential so I am not part of the overtopping consensus. There is an alternative I

44. Rawls apparently thinks it is all right for someone's *evaluation of public reasons* to be colored by one's comprehensive view, since he says that my notion that citizens might be required to "pluck out their religious convictions" does not represent his view. *Id.* at 244 n.33. What citizens are not to do on constitutional essentials and questions of basic justice is to go against the balance of public reasons as they see them.

could accept. Were it adopted I could embrace all the essentials." Or, he may say, "support is consistent with a proper view of the essential of church-state separation, but I must make this claim based only on public reasons." There is a kind of incongruity in saying that people may appropriately look to their comprehensive views to decide whether they support an existing political conception, including its constitutional essentials, but that comprehensive views must take a decidedly back seat when the details of the essentials are in controversy. If the proponent of aid may reject an essential based on a comprehensive view, why should he not be able to reject an unfavorable interpretation of an essential based on a comprehensive view?

An even more central distinction for Rawls is between constitutional essentials and basic issues of justice, on the one hand, and ordinary political issues, on the other. The first problem with this distinction for legislators and citizens involves discerning which issues are covered by constitutional essentials and which are not. Rawls manages fairly successfully to establish plausible criteria, but troublesome borderline cases will be inevitable. If abortion falls within the range of constitutional essentials, what of research on and implantation of fetal tissue and the enforcement of surrogate motherhood contracts? People may not always be sure whether an issue they discuss is an aspect of constitutional essentials or basic issues of justice, requiring reliance on public reasons.

A second, more serious, difficulty with this distinction concerns a frequent relation *between* constitutional essentials (and questions of basic justice) and other issues. Argument about constitutional essentials bears on the disposition of other issues. An issue, such as fetal research and implantation, may not be about constitutional essentials, but its discussion may involve some *arguments from* constitutional essentials, such as the appropriateness of abortion. Should *those arguments* rely only on public reason, although other arguments may employ comprehensive views? The permissibility of abortion and whether the fetus counts as a full human being are part of the constitutional essentials; these questions may be relevant to evaluation of fetal research and implantation because these practices may be more offensive, and their possible encouragement of future abortions is much more disturbing, if the fetus counts as a full human being and

abortion is not a protected right.<sup>45</sup> Should all arguments about encouraging abortions rely only on public reasons?

Rawls, I believe, has not yet faced the extent to which interpretation of constitutional essentials infects ordinary political argument. It would be odd to say that you can use religious (and other comprehensive) perspectives to argue about constitutional essentials when the essentials are not directly involved (the fetal research issue) but you may not use such perspectives when the essentials are directly at stake (the permissibility of abortion issue); but it would also be odd to say that you can use any religious arguments for "nonessentials" *except* for any argument that draws from constitutional essentials. This intermixture of issues presents a troublesome feature of Rawls's distinction that resists easy resolution.

Even when the distinction among issues is clear and issues fit in one category or another, without the perplexing intermixture problem, the idea that different sorts of considerations may be brought to bear on different issues is troublesome. Legislators and citizens are told that all sorts of reasons they may properly treat as relevant over a wide range of political issues should be excised from their decision making and public discussion concerning constitutional essentials and basic issues of justice. Even if Rawls's underlying theory is otherwise sound, it is not one whose force is intuitively obvious or compelling. Most citizens and ordinary legislators in all branches of government would probably find it strange that references to sources of truth for most political issues were in some degree barred to them for a particular category of issues, not always *so easy* to identify. This difficulty seriously compromises the practical usefulness of Rawls's distinction among issues.

Finally, Rawls's approach requires that one decide what counts as public reasons as compared with reliance on comprehensive reasons. The problem about religious comprehensive views is relatively minor. Rawls assumes that in genuine liberal democracies, citizens are not going to accept *with near universality* any particular Christian view, or Christianity in general, or Islam, Judaism, Hinduism, etc. Nor will

45. I do not have an opinion about the extent to which a conviction about abortion *should* affect one's view of fetal research and implantation. Gregory Gelfand and Toby R. Levin claim that opponents of abortion have no plausible basis to oppose fetal tissue research. *Fetal Tissue Research: Legal Regulation of Human Fetal Tissue Transplantation*, 50 WASH. & LEE L. REV. 647, 649 (1993). I present the problem here as an example of a relation between "constitutional" and "ordinary" problems that often exists. For an illuminating set of comments on the relation of religion to bioethics more generally, see *Theology, Religious Traditions, and Bioethics*, HASTINGS CTR. REP., July/August 1990 (Daniel Callahan & Courtney Campbell eds.).

they accept theism as opposed to nontheism. Thus, the exclusion of comprehensive views bars direct reference to Christian, Jewish, Islamic, theist, or atheist premises. Subtle questions arise about the status of religious stories and references to religious traditions as sources of general human or particular cultural understanding, but when they are carefully presented in the right way, such stories and references can fall within the domain of public reasons.

A more serious concern arises over nonreligious comprehensive views, particularly liberal nonreligious comprehensive views. When someone urges that the value of autonomy be respected, it may be virtually impossible for him and others to tell whether he is relying on a particular comprehensive perspective or the widely shared value of autonomy in our culture. Liberal nonreligious comprehensive perspectives are bound to "suffer less" from a principle of self-restraint than both religious views and nonreligious, nonliberal views. This difference may reasonably be thought to involve a kind of inequity.

#### *D. Stability and Fairness*

I have suggested some substantial problems with the principles of self-restraint that Rawls has proposed, and most especially with the line between ordinary political issues and issues that involve constitutional essentials and basic questions of justice. The basic arguments for his approach are ones of political stability and fairness.

Rawls has suggested, convincingly in my view, that diversity of comprehensive religious, philosophical, and moral doctrines is a normal condition of the public culture of democracy. If the followers of these various doctrines feel distrust and fear toward those of different views, that is a strong reason to settle on a political culture of common reason, at least for essentials. But suppose people hold widely differing comprehensive views in circumstances of mutual interest and approval; they trust and want to learn from each other. In such a culture, references back to comprehensive doctrines would not be particularly threatening. Whether such a culture could exist in a society *as* diverse, and *as* prone to hostility and violence as ours may be doubtful; but it is too early in the history of liberal democracy to write off that possibility for all liberal democracies. We should not suppose that the only means by which liberal democratic societies can unite in stability and mutual respect among citizens is by coalescing around a relatively full version of constitutional essentials and an ideal of common reason; some broader acceptance of the relevance of comprehen-

sive views in all political dialogue is a reasonable alternative. If citizens want to be able to bring their own comprehensive views to bear on all political issues and are quite willing to accept the price that others will do so as well, there is no unfairness in comprehensive perspectives being employed to resolve the boundaries of some constitutional essentials.

### CONCLUSION

Rawls's idea of public reason has some powerfully attractive features. The fundamental notion that public political dialogue will be carried forward largely in a discourse that is the shared possession of citizens bears resemblance to present understandings in the United States and has much to recommend it. The precise outlines of Rawls's proposal reflect his own acute sensitivity to the convictions of those who accept widely diverse religious and other comprehensive views, as well as to the claims of common threads of justice and reason. Were he less sensitive to one claim or the other, his resolution would be more simplistic than it is.

For reasons I have partly suggested here, I see serious problems with aspects of Rawls's account. First, I am skeptical that any single resolution is appropriate for liberal democracies in general; a principle of public reason needs to be attentive to time and place. Second, I think the demands of public reason depend to a greater degree on someone's specific place in society than Rawls acknowledges, although he helpfully recognizes some important differences, as between judges and legislators. Third, I believe much less depends on the kind of issue involved than Rawls supposes; "constitutional essentials" do not have a fundamentally different status from ordinary political issues. Fourth, I am persuaded that the distinction between grounds of judgment and public justification needs still more focused attention than Rawls gives it.<sup>46</sup> Although various details in Rawls's account may prove incomplete or unpersuasive, he provides strong arguments both for substantial constraints of public reason and for allowing some scope for comprehensive views in political judgment. No plausible position on these issues can afford to disregard those arguments.

46. I develop a position along the lines I have indicated in GREENAWALT, *supra* note \*.

